



Said v Wewa (Civil Appeal E166 of 2021) [2023] KEHC 18789 (KLR) (10 May 2023) (Judgment)

Neutral citation: [2023] KEHC 18789 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E166 OF 2021
DKN MAGARE, J
MAY 10, 2023**

BETWEEN

AHMED SALIM SAID APPELLANT

AND

SAFINA KIDODO WEWA RESPONDENT

*(An appeal from judgment issued by the Hon Nabibiya
on 23/9/2021 in Mombasa CMCC 97 of 2021)*

JUDGMENT

1. This is an appeal from the Hon Nabibiya given on 23/9/2021 in Mombasa CMCC 97 of 2021. The memorandum of Appeal was filed on 4/10/2021 raising 4 grounds of appeal.
2. The grounds are: -
 - a. The court erred in awarding manifestly excessive damages
 - b. The court ignored the Appellant's submissions.
 - c. The court did not consider past awards.
 - d. The court ignored cap 405.
3. They sought to have the award set aside and a re-assessment done. This matter is basically an appeal on quantum. There is however, a mention of liability in ground 2. I perused the record and could not find the judgment of the court. The record of appeal did not have proceedings. I had to check the handwritten notes of the court.
4. I was initially tempted to strike out the Appeal in limine for lack of the decree. I however quickly remembered article 159(2) d, which provides as doth: -



159. 1. Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.
2. In exercising judicial authority, the courts and tribunals shall be guided by the following principles: -
- a. justice shall be done to all, irrespective of status;
 - b. justice shall not be delayed;
 - c. ...
 - d. justice shall be administered without undue regard to procedural technicalities; and
 - e. the purpose and principles of this Constitution shall be protected and promoted.
5. Though article 159(2) is not a panacea for all ills, I constrained myself. I looked for the original court file. I found that the court had awarded the following: -
- a. 20% against the Respondent
 - b. 80% against the Appellant.
 - c. General damages 1,200,000/=
 - d. Special damages 3,50=
6. Writing this judgment was a nightmare. I had to keep referring to the primary file for guidance. Further reading the lower court judgment, I had to search the holdings and award within the judgment. It is advisable, after making various findings, the court should have a global summary as shown in the preceding paragraph.
7. Each of the parties, in their submissions had their own facts and versions in their mind of the decision. Part of the problem was the record of Appeal was said to be for an appeal from Mariakani PMCC 223 OF 2018. This was obviously an error which is curable. I will not make fodder out of it.
- Duty of the first Appellate court

Duty of the appellate court

8. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.
9. In the cases of *Peters vs Sunday Post Limited* [1985] EA 424 where in the latter case, the court therein rendered itself as follows: -
- “It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”



10. In *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123, this principle was enunciated thus:

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”

11. The High Court, pronounced itself succulently on these principles in *Kemfro Africa Ltd Vs Meru Express Servcie Vs. A.M Lubia & Another* 1957 KLR 27 as follows: -

“The principles to be observed by an appellate Court in deciding whether it is justified in distributing the quantum of damages awarded by the trial Judge were held in the Court of Appeal for the former East Africa to be that it must be satisfied that either the Judge in assessing the damages, took into account an irrelevant fact or left out of account a relevant one or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of damages.”

12. The foregoing statement had been ably elucidated by Sir Kenneth O’Connor P, in restating the Common Law Principles earlier enunciated in the case at the Privy Council, that is, *Nance vs British Columbia Electric Co Ltd*, in the decision of *Henry Hilanga vs Manyoka* 1961, 705, 713 at paragraph c, where the Learned Judge ably pronounced himself as doth regarding disturbing quantum of damages:-

“The principles which apply under this head are not in doubt. Whether the assessment of damages be by the Judge or Jury, the Appellate Court is not justified in substituting a figure of its own for that awarded simply because it would have awarded a different figure if it had tried the case at the first instance...”

13. The duty of the 1st Appellant Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of *Selle and another v Associated Motor Board Company and Others* [1968] EA 123, where the law looks in their usual gusto, held by as follows;-

“An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial Court’s finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally.”

14. The Court is to bear in now that if need her seen the witnesses.it is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.

15. For the appellate court, to interfere with the award it is not enough to show that the award is high or had I handled the case in the subordinate court, I would have awarded a different figure.

16. The Court is to bear in mind that it has not heard nor seen witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for



themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them. In *Fidelity & Commercial Bank Ltd V Kenya Grange Vehicle Industries Ltd* (2017) eKLR, the Court of Appeal, Ouko, Kiage and Murgor JJA held as doth:-

“Courts adopt the objective theory of contract interpretation and profess to have overriding view sometimes called Four Corners of an Instrument, which insists that a documents meaning should be derived from the document itself, without reference to anything outside of the document, extrinsic reversed...”

17. The trial court and this court will construct documents in a similar manner as there are no witnesses required to know the content of a document. Therefore, where the findings of the trial Court are consistent with the evidence generally, this Court should not interfere with the same.

Analysis

18. I have the original Court file before me with typed proceedings. I note that the said arose from an accident on 8/10/2016 involving Motor Vehicle Registration number KAL 695 P and the Respondent who was a pedestrian. The Appellant was said to be the registered owner and also vicariously liable.
19. Special damages were pleaded as follows: -
 - a. police abstract 200
 - b. medical expenses 2,500/=
 - c. medical report 2,000
 - d. total 4,700/=
20. The Respondent pleaded particulars of negligence in paragraph 7 of the plaint.
21. The Appeal is basically on quantum save paragraph 2; however, the same related to their submissions and nothing else.

Liability

22. The Appellant rightly conceded that this Appeal is on quantum only. The Appeal on liability is whole untenable. The Appellant did not testify in court. There is nothing to support the submissions. Failure to testify transforms the defence to mere allegations. There was thus no basis for award of 20%. However, there is no cross appeal.
23. Consequently, the appeal on liability is dismissed in limine.

Appeal on quantum

24. The Respondent pleaded to have sustained the following injuries: -
 - a. Wedge fracture of lumber spine No. 1
 - b. Loss of normal lordosis due to muscle spasms
 - c. Bruises at the back of the head.
25. The court awarded Ksh 1,200,000/=-, at large. He also pleaded special damages of Kshs.3,500/= which are not subject of the appeal. Our duty is not to act in convenience of the court.



Submissions

26. Parties did not submit relevant authorities. The court on the other hand used only one decision.
27. The medical Report dated 13th May, 2019 written by Dr. Wellington Kiamba and produced as exhibit 6, indicated the injuries as pleaded. Dr Kiamba classified the injuries as harm and was of the opinion that it was to take at least 2 months to heal. The Respondent must have healed at the time of trial which took place on 24/9/2020, long after the 2 months were over.
28. . The injuries were not contested since on cross examination of the Respondent was asked whether he suffered a fracture, which he answered in the negative.
29. In its Judgment given 15th February, 2021 the Court awarded General damages of Kshs. 200,000/= for general damages, for pain suffering and loss and amenities. He indicated to have considered the rival submissions, although I cannot see the consideration on the record. This is not a proper way of reviewing evidence and submissions. The court needs to indicate the actual review of evidence and submissions, albeit in a summary manner on record.
30. The duty of the Appellate Court as regards damages is that of discretion. The Court of Appeal for East Africa in *Shah Vs Mbogo & Another* Version Shah (1968) EA 93, held as doth;-

“The (appellate Court) .. should not interfere with the exercise of discretion of a (trial court)..unless satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision or unless it is manifested from the cause as a whole that the Judge was clearly wrong in the exercise of this discretion and that as a result these has been an injustice.”
31. In one of the decisions used by the Appellant in the Lower Court, Justice D.S Majanja on 21st February, 2019 in [Nyambati Nyaswabu Erick Vs Toyota Kenya Ltd & 2 Others](#) (2019) eKLR held as doth:

“General damages are damages at large and the Court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method approach should be that comparable injuries would as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly the same.”
32. It is thus settled that the state of the Kenya economy and the people generally and the welfare of the insured and injury public must be at the back of the mind of the trial Court.
33. The foregoing was settled in the cases of [Butter Vs Butter](#) Civil Appeal No. 43 of 1983 (1984) KLR where the Court of Appealed held as follows as paragraph 8.

“In awarding damages, a Court should consider the general picture of all prevailing circumstance and effect of the injuries of the claimant but some degree ofis to be sought in the awards, so regard would be paid to recent awards in comparable cases in local Courts. The fall of value of monies generally, the levelling up and down of the facts of exchange between currencies...should be taken into consideration.”
34. Finally, in deciding whether to disturb quantum given by the Lower Court, the Court should be aware of its limits. Being exercise of discretion the exercise should be done Judiciously conclusively are circumstances to ensure that the award is not too high or too low as to be an erroneous estimate of damages.



35. The High Court, pronounced itself succulently on these principles in *Kemfro Africa Ltd Vs Meru Express Servcie Vs. A.M Lubia & Another* 1957 KLR 27 as follows: -

“The principles to be observed by an appellate Court in deciding whether it is justified in distributing the quantum of damages awarded by the trial Judge were held in the Court of Appeal for the former East Africa to be that it must be satisfied that either the Judge in assessing the damages, took into account an irrelevant fact or left out of account a relevant one or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of damages.”

36. The foregoing statement had been ably elucidated by Sir Kenneth ‘Connor P, in restating the Common Law Principles earlier enunciated in the case at the Privy Counsel, that is Nance vs British Columbia Electric Co Ltd, in the decision of *Henry Hilanga vs Manyoka* 1961, 705, 713 at paragraph c, where the Learned Judge ably pronounced himself as doth regarding disturbing quantum of damages:-

“The principles which apply under this head are not in doubt. Whether the assessment of damages be by the Judge or Jury, the Appellate Court is not justified in substituting a figure of its own for that awarded simply because it would have awarded a different figure if it had tried the case at the first instance...”

37. Therefore, for me to interfere with the award it is not enough to show that the award is high or had I handled the case in the subordinate court, I would have awarded a different figure.

38. So my duty as the appellate court is threefold regarding quantum of damages:-

- a. To ascertain whether the Court applied irrelevant factors or left out relevant factors.
- b. To ascertain whether the award is too high as to amount to an erroneously assessment of damages.
- c. The award is simply not justified from evidence.

39. To be able to do this, I need to consider similar injuries, take into consideration inflation and other comparable awards.

40. In *Abdi Haji Gulleid v Auto Selection (K) Ltd & another* [2015] eKLR. The court, Justice P Nyamweya awarded 750,000/- for wedge compression on 8/10/2015. This was over 8 years ago.

41. In *West Kenya Sugar Company Limited v Luka Wafula Namasaka* [2020] eKLR the court awarded 2,000,000/= for more serious injuries.

42. The award of 1,200,000/= is thus within range.

Disposition

43. The Appeal, herein being on quantum only and having found that the award of Kshs.1, 200,000/= is not excessive, I hereby dismiss the Appeal with costs.

44. Pursuant to Section 27 of the *Civil Procedure Act*, I hereby award costs of Ksh. 135,000/= to the Respondent payable within 30 days in default, execution do issue.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 10TH DAY OF MAY 2023.

Judgment delivered through Microsoft Teams Online Platform.



KIZITO MAGARE

JUDGE

In the presence of:-

For Appellant No appearance

Mr. Muinde For Respondent

